No. 80-1441

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In the Supreme Court of the United States

October Term, 1980

WILLIAM G. KODGER, etc.,
Appellant,

vs.

W. J. SINGH, M.D.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Section 2305.11 Ohio Revised Code is presumed constitutional until reviewed by the Ohio Supreme Court and consequently, this case is not ripe for review by the Supreme Court of the United States and the appeal of William G. Kodger should be dismissed.

2. Section 2305.11 Ohio Revised Code does not violate equal protection and due process under the Fourteenth Amendment of the United States Constitution and, therefore, the appeal of William G. Kodger should be dismissed.

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Now comes the Appellee, W. J. Singh, M.D., and moves this Honorable Court to dismiss the appeal of William G. Kodger, Appellant, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States for the reason that the Supreme Court of the State of Ohio has not ruled upon the question of the constitutionality, vis-a-vis, equal protection and due process of Section 2305.11 Ohio Revised Code and further that said Ohio Revised Code section does not violate due process and equal protection as afforded under the Fourteenth Amendment of the United States Constitution.

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STATEMENT OF FACTS

William G. Kodger, hereinafter "Appellant", was treated at the Fairview General Hospital emergency room by Dr. W. J. Singh, hereinafter "Appellee", on October 22, 1975, for complaint of laceration of the left foot. At the time of the treatment, Appellant was fourteen years and ten months of age.

Eleven months later, on September 22, 1976, Appellant learned through x-ray of the left foot that a glass sliver was lodged in the foot. A lawsuit was filed by Amended Complaint against Appellee on February 1, 1978. The

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Amended Answer to the Amended Complaint raised the statute of limitations defense. A Motion for Summary Judgment was granted by the Trial Court on the basis of that defense pursuant to 2305.11 Ohio Revised Code which states in part:

> "The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital *apply to all persons* regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital." 2305.11(B) Ohio Revised Code. (Emphasis supplied.)

The Court of Appeals for Cuyahoga County in unanimous opinion affirmed the Trial Court's granting of the Motion for Summary Judgment.

The Supreme Court of Ohio dismissed Appellant's appeal for want of substantial constitutional question.

Appellant is incorrect when he asserts the record indicated a permanent disability of the foot existed when such evidence was not before the Court nor relevant to the disposition of the lawsuit by the Trial Court and affirmance of that decision by the Court of Appeals.

ARGUMENT

I. Section 2305.11 Ohio Revised Code Is Presumed Constitutional Until Reviewed by the Ohio Supreme Court and Consequently, This Case Is Not Ripe for Review by the Supreme Court of the United States and the Appeal of William G. Kodger Should Be Dismissed.

The Ohio Legislature enacted Section 2305.11 of the Ohio Revised Code effective July 28, 1975, governing the limitations of actions concerning "medical malpractice claims". The statute reads as follows:

> "§2305.11 [Time limitations for bringing certain actions; definitions.]
>
> (A) An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice, including an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation, shall be brought within two years after the cause thereof accrued.
>
> If a written notice, prior to the expiration of time contained in this division, is given to any person in a medical claim that an individual is presently considering bringing an action against that person relating to professional services provided to that individual, then an action by that individual against that person may be commenced at any time within one hundred eighty days after that notice is given.

(B) In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred. The limitations in this section for filing such a malpractice action against a physician, podiatrist, or hospital apply to all persons regardless of legal disability and notwithstanding section 2305.16 of the Revised Code, provided that a minor who has not attained his tenth birthday shall have until his fourteenth birthday in which to file an action for malpractice against a physician or hospital.

(C) A civil action for nonconsensual abortion pursuant to section 2919.12 of the Revised Code must be commenced within one year after the abortion.

(D) As used in this section:

(1) 'Hospital' includes any person, corporation, association, board, or authority responsible for the operation of any hospital licensed or registered in the state, including without limitation those which are owned or operated by the state, political subdivisions, any person, corporation, or any combination thereof. Such term further includes any person, corporation, association, board, entity, or authority responsible for the operation of any clinic that employs a full-time staff of physicians practicing in more than one recognized medical specialty and rendering advice, diagnosis, care and treatment to individuals. It does not include any hospital operated by the government of the United States or any branch thereof.

(2) 'Physician' means all persons who are licensed to practice medicine and surgery or osteopathic medicine and surgery by the state medical board.

(3) 'Medical claim' means any claim asserted in any civil action against a physician, podiatrist, or hos-

pital arising out of the diagnosis, care, or treatment of any person.

(4) 'Podiatrist' means all persons who are licensed to practice podiatric medicine and surgery by the state medical board."

The Supreme Court of Ohio has not reviewed the statute on constitutional grounds and, therefore, has not decided whether the statute violates equal protection or due process under the Fourteenth Amendment of the United States Constitution or under the comparable provisions of the Ohio Constitution. A statute, of course, is presumed constitutional as stated by the Ohio Supreme Court in *State ex rel. Jackman, et al. v. Court of Common Pleas of Cuyahoga County, et al.*, 9 Ohio St. 2d 159, 38 Ohio Op. 2d 404.

The Supreme Court recently in *Vance v. St. Vincent Hospital and Medical Center, et al.*, 64 Ohio St. 2d 36, 141 N.E.2d 406 (1980), stated specifically in reviewing 2305.11 Ohio Revised Code that the considerations of constitutionality had not been raised in the appeal. The statute is, therefore, presumed constitutional until ruled unconstitutional by the Ohio State Supreme Court.

"We may not question the wisdom of this legislation. Unless a statute is constitutionally deficient this court must uphold it. *Ohio Mathieson Chemical Corp. v. Ontario Store* (1967), 9 Ohio St. 2d 67, 70. Having interpreted R.C. 2305.11 concordant with what we firmly believe to be the intent of the General Assembly, we find that the constitutionality of the statute, not being an issue raised in the lower courts, is not before us. *Republic Steel Corp. v. Bd. of Revision* (1963), 175 Ohio St. 179; *Szymanski v. Halle's* (1980), 63 Ohio St. 2d 195, 198-99." *Vance, supra*, at pp. 41, 42.

Certainly, until the Ohio Supreme Court considers the constitutionality of the statute, the presumption of constitutionality exists. Therefore, the appeal by William G. Kodger should be dismissed.

II. Section 2305.11 Ohio Revised Code Does Not Violate Equal Protection and Due Process Under the Fourteenth Amendment of the United States Constitution and, Therefore, the Appeal of William G. Kodger Should Be Dismissed.

The Appellant contends the statute as plainly written shall be void as violating the Ohio and United States Constitutions specifically the Fourteenth Amendment equal protection clause of the United States Constitution.

The Supreme Court of Ohio in *State ex rel. Jackman, et al., supra,* stated:

> "However, when an enactment of the General Assembly is challenged, the challenger must overcome a strong presumption of constitutionality." (Citations omitted.) *The State ex rel. Jackman, supra,* at p. 405.

The Court went on to state:

> " 'In determining whether an act of the legislature is or is not in conflict with the Constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the General Assembly, and *whatever limitation is placed upon the exercise of that plenary grant of power must be found in a clear prohibition by the Constitution.* The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative discretion has been qualified or restricted by the Constitution in reference to the

> subject matter in question. If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception.' " (Emphasis added.) *State ex rel. Jackman, et al., supra,* at p. 406.

The Appellant has put forth no valid reason for holding the statute unconstitutional. Appellant attempts to analogize between a ten year old and a plaintiff who is one day short of his tenth birthday to presumably show unequal treatment. Any statute of limitations dealing with minors or others will result in different lengths of time in which a Complaint may be filed dependent upon when the cause thereof arose in relationship to the potential plaintiff's age.

As pointed out by the Supreme Court of Ohio in *State ex rel. Lourin v. Industrial Commission of Ohio,* 138 Ohio St. 618, 21 Ohio Op. 490:

> "But the law abounds with situations where a difference of a minute may work a great change in rights and liabilities. Any statute of limitations illustrates this. In the interest of administrative workability, or to effect gradations in legislative policy, certain definite markers must be established, even though it may be admitted that an apparent hardship results to those whose rights lie just outside. It is, of course, for the Legislature to determine just where such boundaries shall be set." *State ex rel. Lourin, supra,* at p. 492.

In other words, while the Appellant, hypothetical ten year old, may have a shorter period of time in which to file a lawsuit under 2305.11 O.R.C., nevertheless, that pe-

riod of time being one year is reasonable and affords that plaintiff an opportunity to have his or her claims determined through the judicial process.

> "The time limit and nature of such legislative enactment rests within the sound discretion of the general assembly of Ohio." *Ulmer, Trustee v. Honeywell, et al.*, 64 Ohio L. Abs. 582 at p. 585 (1952).

The Appellant has not overcome the strong presumption of constitutionality which exists with respect to Sec. 2305.11 Ohio Revised Code as amended. Therefore, there is no substantial constitutional question that 2305.11 violates the equal protection provisions of the Ohio or United States Constitutions.

CONCLUSION

The Ohio legislature after extensive hearings amended Ohio Revised Code Section 2305.11 which is the statute of limitations section governing "medical malpractice" claims. It is historically the legislative prerogative to enact statutes of limitations and within the legislative domain to define the accrual of the statute of limitations which authority is shared with the judicial branch through the common law interpretation of the statute of limitations enacted by the legislature.

The statute enacted by the legislature in this case is presumed constitutional and Appellant has set forth no argument which would overcome that presumption. The statute is clear on its face and bars Appellant from proceeding against Appellee under the facts as set forth before this Court.

Finally, the Ohio Supreme Court has not considered the constitutionality of the statute. The presumption of

constitutionality should be tested in the State Supreme Court before consideration by the United States Supreme Court. For the reasons that the statute on its face is presumed constitutional and the appeal is not ripe for review by this Honorable Court, it is respectfully requested that the appeal of William G. Kodger be dismissed.

Respectfully submitted,

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W. J. Singh, M.D.